DOCUMENT RESUME

ED 378 768 EC 303 667

AUTHOR	Symington, Gloria T.
TITLE	Mediation as an Option in Special Education. Final Report.
INSTITUTION	National Association of State Directors of Special Education, Alexandria, VA.
SPONS AGENCY	Special Education Programs (ED/OSERS), Washington, DC.
PUB DATE	13 Jan 95
CONTRACT	HS92015001
NOTE	24p.; Prepared by Project FORUM.
PUB TYPE	Reports - Evaluative/Feasibility (142)
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	Compliance (Legal); *Conflict Resolution; *Disabilities; *Due Process; Educational Legislation; Elementary Secondary Education; Federal Legislation; Hearings; *Special Education; State Programs
IDENTIFIERS	*Individuals with Disabilities Education Act; *Mediation

ABSTRACT

This synthesis paper examines the use of mediation to improve parent-school district communication and resolve disagreements in special education. It focuses on the development and implementation of mediation as a viable alternative to the formal hearing process under the Individuals with Disabilities Education Act (IDEA). After an introduction, the first section describes state mediation models in five states: Connecticut, Massachusetts, New Jersey, New Hampshire, and Pennsylvania. The next section examines the role of the mediator and training for that role. The third section presents 1993 data on mediation usage in the five states studied and related issues, including the outcomes of mediation and the effect of attorney fee reimbursement. Mediations held in these states varied from 17 in New Hampshire to 768 in Massachusetts. The paper's concluding section notes such ongoing issues as the growing cost to states in maintaining the mediation service and the excessive litigiousness that sometimes characterizes the process. Recommendations include reviewing all aspects of special education due process as part of the pending reauthorization of IDEA. (Contains 17 references.) (DB)

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MEDIATION AS AN OPTION IN SPECIAL EDUCATION

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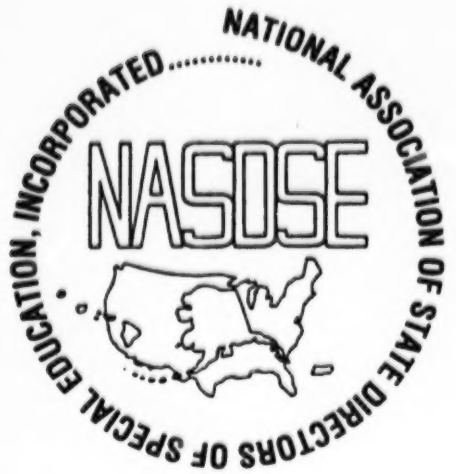
by Gloria T. Symington



Final Report
Year 2 Deliverable #5-2-3
Under Contract No. HS92015001
January 13, 1995

Prepared for:
Office of Special Education Programs
U. S. Department of Education

Prepared by:
Project FORUM

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EC 303667

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This report was supported in whole or in part by the U.S. Department of Education (Contract No. HS92015001). However, the opinions expressed herein do not necessarily reflect the position or policy of the U.S. Department of Education, and no official endorsement by the Department should be inferred.

ACKNOWLEDGEMENTS

The author is very grateful to the following people who willingly participated in telephone and personal interviews, providing an increased perspective on the similarities and differences of mediation programs in various states:

Thomas Badway and Tom Gillung, Connecticut
Cathy Fromme, Washington
Sally Hamburg and Kevin McDowell, Indiana
Dennis Moyer, New Jersey
Angela Naradko, Pennsylvania
Jackie Teague, New Hampshire

Anita Heisig, Wisconsin

The author expresses special thanks to Art Stewart who generously shared his expertise as the Coordinator of Mediation for Massachusetts. It was immensely helpful to have his input regarding past and current practices and trends in special education mediation.

Eileen Ahearn of NASDSE was particularly helpful, providing materials, advice and support throughout the development of this project.

Project FORUM extends its sincere appreciation to all the individuals whose efforts have served to enrich the quality and accuracy of this document. The individuals listed below, who constituted a Quality Review Panel for this work, have reviewed and commented on an earlier draft of this document.

Tom Gillung, Bureau Chief
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and Continuing Education
New York State Department of Education

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The Federation for Children With Special Needs

Our acknowledgement of all the named individuals does not necessarily indicate their endorsement of this final document.

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ABSTRACT

This paper contains a discussion of the use of mediation to improve parent-school district communication and resolve disagreements in special education. The contents focus on the development and implementation of mediation, an optional approach in meeting due process requirements, as a viable alternative to the formal hearing process. Mediation is a non-adversarial method to conflict resolution that results in reduced stress and lower expense for the participants. This option has been made available in many states, beginning in 1975 in Connecticut and Massachusetts, and is presently available in 39 states.

Although the premise for providing mediation as an option is the same in all states, the statutes and guidelines governing the procedure vary widely. Some states actively promote mediation much more aggressively than others, but there is no statistical evidence to demonstrate that the resulting higher numbers of mediation provide a higher rate of successful educational programs for students with disabilities. Overall, the number of mediations is so small (only slightly over 1000 in 1993 in the five states reviewed for this paper), and the variation from session to session so great, that it has not been possible to conduct a meaningful study of the ultimate effectiveness of this option in contributing to the improvement of education for students with disabilities.

There have also been no data collected on the possible impact of the availability of attorneys' fees for mediation. There is no statistical evidence that such availability has influenced the incidence of mediation in those states where attorneys are allowed to represent parties to a mediation, nor are there any precise figures regarding the cost involved in paying such fees.

In the absence of clear evidence regarding the positive effect of mediation on achievement of the goal of providing an opportunity for appropriate educational programs for students with disabilities, questions still remain as to the efficacy of the entire due process system and the benefits derived from the time and scarce educational dollars it consumes. Yet, the limited documentation currently available appears to confirm the benefits of mediation over the more formal due process hearing as the strategy for reaching a successful settlement of disputes between parents and schools. Given the premise that the best educational program for any student is one on which parent and school district personnel agree, it appears that the option of mediation under special education laws should be retained and expanded to all states, and consideration might even be given to expanding it to all students. However, the money and time involved should be strictly controlled so that the cost/benefit ratio yields a distinct advantage to the student and does not result in a significant negative impact on education budgets. This synthesis also suggests that further research into the entire due process component of federal and state legislation is needed to answer the questions raised and to inform policy makers.

FOREWORD

This report is the result of a study done under Project FORUM, a contract funded by the Office of Special Education Programs of the U. S. Department of Education and located at the National Association of State Directors of Special Education (NASDSE). Project FORUM carries out a variety of activities that provide information needed for program improvement, and promote the utilization of research data and other information for improving results for students with disabilities. The project staff also provides technical assistance and information on emerging issues, and convenes small work groups to gather expert input, obtain feedback, and develop conceptual frameworks related to critical topics in special education.

The purpose of this synthesis is to document the development and use of mediation as a strategy to improve communication and resolve disagreements between schools and parents of students with disabilities. Due process procedures that have been implemented under the Individuals With Disabilities Education Act (IDEA) have been criticized at an increasing rate for their adversarial nature, their excessively negative effects on all parties, and their unreasonable costs in time and money. IDEA "permits" the use of mediation as an "intervening step prior to conducting a formal due process hearing" [34 CFR §300.506], and many states have initiated mediation systems that have prevented some of the negative consequences of formal hearings.

With the pending reauthorization of IDEA, there is much interest in the use of mediation throughout the country and the experience of states that use the procedure. This synthesis contains a description of the major components of a mediation system for special education and profile of the mediation systems in five states to illustrate current practice.

In addition to this synthesis, Project FORUM has also published an analysis of data gathered through a 1994 NASDSE survey on mediation and due process practices. Specific reference is made to these data in this synthesis. The report of that analysis, entitled *Mediation and Due Process Procedures: An Analysis of State Policies*, is available from NASDSE at 1800 Diagonal Road, Suite 320, Alexandria, VA 22314.

MEDIATION AS AN OPTION IN SPECIAL EDUCATION

INTRODUCTION

Under the Individuals With Disabilities Education Act (IDEA) and related state law, a due process hearing can be requested by a parent or an educational agency related to either an initiation or change in the identification, evaluation or educational placement of a student with a disability, or the refusal of the agency to provide a free appropriate education (FAPE) to the student [20 U.S.C. Chap. 33 §1415]. These hearings are formal processes involving a hearing officer, lawyers for both sides in the dispute, the presentation of evidence by witnesses, and recording of the sessions by court reporters. The federal law has been further interpreted by regulations [34 C.F.R. §300], and policy documents issued by the U. S. Department of Education, Office of Special Education Programs (OSEP). For example, section 300.512 addresses the issue of timelines for special education due process hearings. The hearing must be held, the final decision reached and a copy mailed to the parties not later than 45 days after the receipt of a request for hearing. An extension of the timeline may be granted by the hearing officer for compelling reasons. Such extensions are common occurrences, and are granted at the request of either or both parties absent any objection from opposing counsel. Requests for extensions are usually made due to the unavailability of expert witnesses or to accommodate the court calendar for either or both attorneys. This, of course, defeats the purpose of the 45 day timeline–that of providing an adequate and appropriate program in a timely manner. Each state may vary its timeline for scheduling any pre-hearing procedure or option such as mediation, but the 45 day timeline for completion of a hearing is a constant under federal regulations.

Almost from the outset of the implementation of procedural safeguards in IDEA, it was evident that special education due process hearings consumed inordinate amounts of time and money, and were emotionally draining to parents and to school personnel. It soon became apparent that the result of a hearing often did not satisfy either party and left great animosity in its wake. This usually fostered a breakdown in communication and often left the parties more vulnerable to future conflicts.

Mediation is a form of conflict resolution that, when successful, may help parties with opposing viewpoints reach a mutually agreeable settlement without some of the disadvantages inherent in the due process hearing. The major rationale for offering mediation as a method for resolving conflict in educational decisions regarding students with disabilities is to help eliminate or reduce some of the major problems associated with formal due process hearings: the adversarial nature of the hearing process, the emotional and financial costs to the participants, the lingering animosity and resentment of both parties as a result of the confrontation. It also permits parents and administrators, with the help of a mediator, to clear the air, to examine a child's needs freshly, and to jointly determine a course of action.

Federal regulations do not require mediation as an intervening step prior to a formal due process hearing. In the comment following Section 300.506 of the regulations for IDEA Part B, mediation is mentioned as bringing successful "resolution to differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress." The same comment contains the admonition that mediation may not be used to deny or delay a parent's rights under section 300.506.

Prior to the 1977 enactment of IDEA, Connecticut and Massachusetts had special education legislation that provided full due process rights to children with disabilities, and those states had already been involved in due process hearings. In 1975, recognizing the deleterious effects of such litigation and the fact that the parties to a disagreement were often not prepared for or desirous of a formal hearing, these states introduced mediation as a voluntary option for parents and school districts. As parents and school districts increasingly availed themselves of their due process rights in other parts of the country, the mediation option was explored in other states.

Although, in theory, mediation was accepted as a viable alternative to a full hearing, there was often apprehension regarding its implementation on the part of states that were just beginning special education programs. For example, in 1986 the coordinators of the Connecticut and Massachusetts special education mediation programs were invited to provide a workshop for the Pennsylvania Department of Special Education. Participants in the workshop expressed great concern regarding relinquishment of power, confidentiality, implementation of agreements, and the non-binding nature of the agreement. However, in spite of such concerns, Pennsylvania and other states offered mediation to parents and school districts in response to the need to reduce the increasing burdens of time, paperwork, attorneys' fees and, not least, acrimony associated with hearings. Acknowledging the benefits to the child of having parents and school districts resolve their conflicts in a constructive, non-adversarial procedure, Pennsylvania instituted a mediation option in 1987. Indiana did the same in 1989.

On the Pacific coast, California had already instituted mediation by 1980, and the North West Regional Resource Center offered an introductory workshop on mediation to its member states in 1982. The state of Washington participated in this workshop and contracted with the Atlanta Justice Center to train 25 mediators in 1984. However, there were few hearings and, while desirable, the mediation option did not seem to be a pressing need. There were numerous factors which brought the need for mediation to the forefront again in the early nineties, not the least of which was an increase from 10 hearings in 1991 to 72 hearings in 1993. Although Washington does not include mediation in its special education statutes, the state will offer mediation beginning in the fall of 1994.[1]

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[1]Telephone interviews with Cathy Fromme, Supervisor, Cross Cultural Special Education, Department of Public Instruction, Washington (July 19, and August 23, 1994).

Over the past nineteen years, most states have moved to include mediation as a voluntary option in their special education due process procedures. In a survey completed by the National Association of State Directors of Special Education (NASDSE) in April 1994, 39 states reported offering mediation as an option. One of the eleven remaining states, Wisconsin, reported that informal mediations were presently occurring and they are considering revising procedures to include a mediation system, which would leave only ten states without such an option.[2] Because mediation is not a requirement under federal statute, each state that offers this option has been free to write its own regulations. A review of mediation guidelines used by individual states reflects one of the most attractive aspects of this procedure: each state can be as formal/legalistic in its approach as it perceives is necessary to meet the needs of its special education community.

The remainder of this report consists of: 1) a description of state mediation models in five states as examples of the use of this practice; 2) an examination of the role of the mediator and the training for that task; and, 3) recent data for the five states studied and related issues including the outcomes of mediation and the effect of attorney fee reimbursement. The report concludes with a discussion of trends and potential changes in the use of mediation and recommendations for improvement.

STATE MEDIATION PROGRAMS AND ISSUES

State Mediation Models

Five state models were reviewed for this synthesis: Connecticut and Massachusetts, which have offered a formal mediation option for a longer period than any other states, and three other Northeastern states–New Jersey, New Hampshire and Pennsylvania. Highlights from these state mediation systems follows.

Massachusetts, which had in excess of 700 mediations in 1993, is very aggressive in its approach. School districts are required to notify the State Department of Education whenever an individual education plan (IEP) or a finding of no special needs is rejected by a parent. The Bureau of Special Education Appeals then takes the initiative, sending the parent a packet of information regarding the appeals procedure and the paperwork necessary to request a hearing. A letter is sent to the parent(s) that describes the voluntary nature of mediation and contrasts the mediation and hearing options. At the same time, the rejected IEP is sent to one of the State's full-time mediators. This mediator then contacts the parents to offer mediation service and to schedule the session if the parents are interested (Massachusetts Department of Education, 1994). Whether or not this approach

[2]Interview with Anita Heisig, Department of Public Instruction, Wisconsin (July 19, 1994).

accounts for the high rates of mediation and due process appeals in Massachusetts is debatable. The volume of mediation does, however, appear to color the nature of the actual mediation sessions. These sessions rarely last more than two or three hours, and a mediator may, in fact, conduct two sessions in one day. The mediators are business-like in their approach and are very skilled at swiftly facilitating an acceptable conclusion.

Connecticut, which had 88 mediation in 1993, requires school districts to forward any request for due process to the State Department of Education Bureau of Special Education and Pupil Services. However, unlike Massachusetts, Connecticut does not require a school district to notify the Bureau whenever an IEP or a finding of no special needs has been rejected by a parent. Therefore, the Bureau does not get involved, either directly by the parents or through the school district, unless due process is specifically requested in writing by either party. When a written request for mediation is received from a parent or a school district, it is considered a request for a hearing (Connecticut State Department of Education, 1994). Connecticut has adopted this requirement to ensure that everyone understands that participation in mediation does not in any way mitigate a party's right to a due process hearing. If the mediation produces an agreement, the hearing request is canceled. If there is no resolution, the hearing proceeds as scheduled unless the initiating party withdraws the original request for due process.

Once a request for mediation is received, the Connecticut Department of Education assigns a mediator from a pool of state employees knowledgeable about special education and trained as mediators. Until 1991, the state used a mix of state employees and private contractors to conduct mediation. Budget cuts eliminated the use of private contractors. Unlike Massachusetts mediators who receive the rejected IEP and may, in fact, speak to both parents and school district personnel in order to schedule a session, the Connecticut mediators more often arrive at a session knowing only the child's name. Connecticut personnel feel that this approach emphasizes the recognized role of a mediator–the responsibility of the mediator is <u>not</u> to rule on any issue presented, but to facilitate agreement between the parties. The mediator is to be perceived as a neutral party, who comes to the session with no preconceived ideas regarding a solution to the conflict and who will have no ownership of the agreement. This lack of previous information allows the mediator to draw out the issues, and help each party articulate concerns while also providing the mediator with a basic understanding of the issues. Although it takes longer to explain the issues to a mediator who has no previous knowledge of a case, this procedure provides an opportunity for each party to "hear" the other's viewpoint in its entirety at one sitting. If the parents feel that they have not been heard in prior interactions with the school district, this opportunity is a very important element. This approach may also help to dispel miscommunications because neither party can assume that the mediator already knows the answer to a particular question. The theory behind this tactic is that complete communication in the presence of a neutral party can lead to better understanding of the

issues by everyone involved, foster resolution of the conflict and lay the groundwork for future cooperation. A key goal of these sessions is cooperation between the parties.

Pennsylvania has provided mediation as a voluntary option in its due process procedures since 1987. The mediation may occur prior to or concurrent with a request for a due process hearing, but may not interfere with the right to a hearing or with due process timelines (Pennsylvania Department of Education, 1994). In 1993, Pennsylvania held 55 mediations. Unlike Massachusetts and Connecticut, their mediators have diverse professions and backgrounds, and are not associated with the state education agencies, advocacy agencies or local educational districts. It is emphasized in the guidelines that the mediator does not impose a resolution to the dispute, but facilitates the process leading to resolution. As in Connecticut, participants are cautioned that the mediation session may take all day.

One way in which Pennsylvania's procedures differ from those in Connecticut and Massachusetts is the extent to which the state is involved in the aftermath of the agreement. At the close of a Pennsylvania session, all participants are requested to complete the mediation/mediator evaluation questionnaire. Sealed and completed evaluations are included with case materials returned to the state. Further questionnaires are mailed to all parties at approximately ten and 90-day intervals. Responses to these questionnaires serve a two-fold purpose: evaluating the effectiveness of the mediation service and monitoring the status of specific cases.

New Jersey has offered mediation services since 1981. In 1993, 141 mediations were conducted by trained State Department of Education employees. The written request for mediation must contain a statement of both the issue involved (from the requesting party viewpoint) and the solution sought by that party. The mediation is held within 20 days of the written request. In addition to a direct request for mediation which may be made to the school superintendent, the county supervisor of child study or the director of the Office of Special Education Programs, New Jersey provides a second route to mediation. When a due process hearing is requested, a pre-hearing conference is scheduled to occur within seven days. Attendance is voluntary. If the parent attends, mediation is made available. The pre-hearing conference may end in a variety of ways: with a settlement, with a withdrawal of the request for a hearing, with the initiation of mediation, or with a transmittal statement which will precipitate the scheduling of a hearing date (New Jersey State Department of Education, 1993).

New Hampshire, which has provided mediation services since 1982, held 17 sessions in 1993. As with the models previously described, the procedure is entirely voluntary and is scheduled so as not to interfere with due process hearing timelines. The mediators, as in other states, are trained to provide this service. However, unlike the other states

mentioned in this report, the mediators are volunteers. Additionally, New Hampshire states in its guidelines for the procedure that "neither side will bring an attorney" (New Hampshire State Department of Education, 1984). [3]

The basic premise of mediation remains the same in all of the systems: resolution of a specific conflict with the help of a trained, neutral party and without the formal, legalistic procedures inherent in a due process hearing. However, state models differ in implementation procedures such as the way mediators are selected and/or assigned, the scheduling of session(s), the presence/absence/extent of follow-up involvement by the state education agency, and/or the amount of time a session is presumed to require,

Role of the Mediator

While the procedures differ in each of the models reviewed, the role of the mediator in special education due process remains essentially the same. The role presumes a broad range of communication skills as well as a sound knowledge of special education, including relevant state and federal laws and regulations. The mediator should be able to move parties in disagreement through the employment of diverse strategies to identify, discuss and agree upon alternative services and strategies that they feel will appropriately meet the needs of the student. Since there is no single most effective approach to resolution of the problems that arise in special education, the mediator must be flexible in adapting approaches to each new problem and each different group of personalities in the mediation.[4]

The author and her colleague, Art Stewart of the Massachusetts Department of Education, developed the following generic descriptors that they use as a part of their training programs for mediators.

A successful mediator:

- treats parties with respect while maintaining an impartial distance from any affiliation with them;

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[3]The U. S. Department of Education Office of Special Education Programs (OSEP) has ruled that Part B funded mediation systems do not need to grant parents the right to representation by a third party during mediation if the parents are informed that mediation is a voluntary step prior to formal administrative procedures, and that they may terminate the mediation sessions at any time and proceed to a due process hearing (Letter to Decker, 1992).

[4]Additional information about the role of a mediator is available in the book by Claire B. Gallant cited in this paper's References.

- maintains the appearance as well as the fact of neutrality throughout the proceedings so that parties may develop trust;
- defines clear ground rules to create a safe context for exploration of issues in dispute;
- guides parties through a reexamination of their premises and conclusions;
- sets a rational and analytic tone to encourage fresh thought and reduce the impact of unsupportable ideas;
- discourages characterizations that seek to disenfranchise people;
- directs energy and communication toward defining the needs of the child in question and consequent fitting program options;
- keeps participants focused on the issues at hand;
- helps parties to generate options;
- helps parties to listen to each other through restatement and reframing;
- provides caucus opportunities for private discussions when appropriate;
- helps parties to assess the utility of alternative options and their impact in a possible agreement;
- supports parties' self-determination of the outcome;
- reframes issues and dilemmas in order to encourage new thinking;
- interprets issues of law, case law and regulation as necessary to guide parties toward a realistic assessment of obligations and their best alternative to a negotiated agreement;
- brings closure to the mediation in an articulate and timely manner; and,
- prepares a concise written document that provides clear direction for the implementation of an agreement.

Though the elements of the mediator's role outlined above are not meant to be exhaustive, they do provide a general overview. The overriding responsibility of the

mediator is to determine whether a compromise, within the laws and regulations, can be effected and cooperation between parents and school improved. This responsibility remains constant, in spite of differences in individual state procedures.

Training of Mediators

In substance, all mediator training focuses on the skills necessary to enable the mediator to fulfill this complex and demanding role. Initial training usually introduces mediators to conflict management styles and the uses of each style. Methods of problem identification may be included in the training, as well as techniques for eliciting information, identifying goals, generating solutions, evaluating solutions, and reaching an agreement.

Mediator training usually involves at least 30 hours of skill development through lecture, demonstration and role play aimed at improving the mediator's grasp of theory and performance skills. Then a new mediator is involved in co-mediation with an experienced mediator followed by "coached" mediation. Some variation of this approach to skill development occurs in most states that have a mediation system.

It may be necessary, regardless of the educational background of the trainees, to review information regarding assessment instruments currently in use for special education evaluations. It is also helpful to provide information on currently available facilities and services for students with disabilities within the state.

Because knowledge of federal and state requirements is essential, training must include a component that provides this information. Mediators are also trained to write clear, concise agreements which include all essential information such as timelines, responsibilities and monitoring devices. If confusion develops over the meaning of a written settlement, a primary goal of mediation, improved communication, has not been met.

In addition to formal training workshops, new mediators may be provided an opportunity to observe several actual mediations. An experienced mediator usually accompanies a new mediator to the first mediation session after training is complete. Most states also provide ongoing training directed both at keeping mediators current with federal and state regulations and policies and at honing and expanding basic conflict resolution skills.

In addition to training mediators, those states that offer mediation usually provide a semblance of participant training in the form of workshops designed to familiarize parents and school district personnel with the mediation process. In Connecticut and Massachusetts, these workshops are frequently offered through parent advocacy groups, teacher in-service training, PTA groups and in some instances, combination groups of parents and educators.

Data for Selected States

Table 1 contains data for the five states discussed in the previous section. These data were selected from the results of a survey conducted by the National Association of State Directors of Special Education and reported in an analysis published by that organization (Ahearn, 1994).

It should come as no surprise that Massachusetts, with the most aggressive approach to promoting the mediation option to parents held the greatest number of mediation in 1993–a total of 768. Since parents are automatically contacted by that state whenever they reject an IEP and are informed of their due process rights, they may feel encouraged to avail themselves of the process. This is quite different from having a parent receive a written description of their due process rights at the beginning of an IEP meeting and then being left on their own in the event of an unsigned IEP. In the latter instance, the parent must initiate the process, something many of them are hesitant to do.

It is interesting to observe that Massachusetts with more than twice Connecticut's number of identified special education students, held more than eight times as many mediations as Connecticut, but only twelve more hearings. There are a number of factors that influence the decision to request a hearing and follow the hearing process to a completion. Therefore, one can only speculate on the reasons for these statistics, and it is not possible to determine from these statistics the exact impact the mediation option in and of itself had on the number of hearings actually held.

Table 1
Mediation System Data for 1993 for Selected States

Item	CT	MA	NH	NJ	PA
Number of Identified students with disabilities for 1991-92*	61,851	136,640	19,276	178,324	190,791
Year mediation Began	1975	1975	1982	1981	1987
Mediation held in 1993	88	768	17	550	55
Percent of 1993 mediation that failed and resulted in request for due process hearing	(9) 10%	(115) 15%	No data	(198) 36%	(11) 19%
Requests for hearing in 1993 (including those that first went to mediation)	278	458	72	740	213
Due process hearings actually held in 1993	77	89	15	176	78

**Fifteenth Annual Report to Congress on IDEA 1993*, Table AA10

In addition to the nine mediations that failed in Connecticut and resulted in due process hearings, Connecticut also had 269 hearing requests (total of 278). In Massachusetts, in addition to the 115 mediation that failed and resulted in requests for due process hearings, Massachusetts had 343 other requests (total of 458). However, each state actually held only 77 and 89 hearings respectively. Even in New Jersey with the highest number of actual hearings at 176, and Pennsylvania at 78, the number of hearings actually held were far below the number of requests for hearings.

What happened in the cases of all the other requests that never reached an actual hearing? In the states where mediation is an option, disputes are often resolved prior to hearings whether or not a formal mediation session is held. Disputes may, in fact, be resolved at a later date even if agreement is not reached in formal mediation session. For example in Connecticut, of the 77 hearings held, only 44 resulted in decisions rendered by the hearing officer. In the 33 remaining hearings, an agreement between the parties was read into the record.

These statistics may be more a reflection of the inexact nature of decisions regarding special education programs than a reflection of the efficacy of mediation.

Outcomes of Mediation

Parents and educators may be willing to reconsider options when they are able to acknowledge their own uncertainty as to the absolute correctness of their positions. Mediation gives both parties the opportunity to effect a settlement with the help of a neutral, knowledgeable third party. Mediation also leaves each party with some control regarding the particulars of an agreement, making it a win-win rather than a win-lose situation-an essential factor in good parent-school relationships.

Assessment of parent satisfaction with the mediation process is complicated by the inexact nature of special education programming and differing perceptions of success. For example, the parent may participate in a "successful" mediation resulting in an agreement that is acceptable to all. However, the mutually agreed upon program may ultimately prove to be unsuccessful for the student, and this may influence the parent's view of the mediation process that resulted in the placement.

A parent survey conducted in 1987 as part of a Mediation Project out of the Department of Special Education at the University of Kansas indicated that parents who took part in the mediation procedure reported significantly lower ratings of emotional cost to parents and families (McGinley, Turnbull and Tollefson, 1987). However, Budoff and Orenstein (1985) reported in their study that only 13 percent of the parents they interviewed thought they would not have further disputes with the school. Despite that prediction, the parents interviewed generally were pleased with a process they saw as fair.

Due Process Costs

There is no published data on state costs for maintaining and administering due process hearing services. However, for the 1993-94 fiscal year, Connecticut estimates that the State Department of Education's expenses for hearing officers and court reporters was $262,000. Professional and support staff time for the administration of special education hearings accounted for an additional $125,000 for the same period.[5] This review does not contain figures on the costs to school districts for these hearings. However, using an average of four days per hearing for the 77 hearings held in 1993 plus at least two days for preparation per attorney for each hearing at a conservative rate of $125 per hour, the cost to school districts for attorneys fees alone was probably in excess of $600,000 for the year.

Mediation costs do not approach the magnitude of hearing costs, but they can become significant in some cases. Connecticut estimates its cost at about $100,000 per year for professional and support staff to provide such services. School districts may have to pay

[5]Telephone interview with Thomas Badway, Connecticut Department of Education, November, 1994.

attorney's fees, although mediations are usually concluded in one day or less, and not all parents or school districts bring attorneys to mediation sessions.

Another example of the extent to which due process costs can escalate was provided by Perry Zirkel (1994) who cited the excessive transaction costs a hearing can involve: one case in Pennsylvania lasted for 19 sessions for which the cost of the transcript alone was $27,000 and the cost of the hearing officer was $20,000. These state costs do not include attorney's fees or the costs for expert witnesses or local staff time.

In 1986, Congress passed legislation allowing parents who prevail in a hearing to recover their attorney's fees. School districts that prevail are not accorded this right. This law has been interpreted differently in different states. In a recent study, Moscovitch (1993) found that recovery of legal fees by parents in Massachusetts is virtually automatic while, by contrast, Wisconsin parents must seek recovery of legal fees in court and such recovery is rarely awarded. He observed that legal fees in Massachusetts, which can be substantial because they include the cost of expert witnesses, often cause school officials to compromise with parents against their better judgment rather than risk incurring the cost of both sets of legal fees.

Attorney's Fees in Mediation

One concern that has arisen in some states is the impact of the reimbursement of parents for their attorneys' fees when the parent is the prevailing party in a settlement. Reimbursement has been held to be applicable to settlements reached through mediation (*Masotti v. Tustin*, 1992). Myron Shreck (1994) states in part ".... once the courts have settled upon the rules of compensability, attorneys will uncover the means of assuring that their work for the prevailing parents will be compensable" (p. 10).

Attorneys can recoup fees from mediation as well as from hearings, but there is no hard evidence to indicate that the availability of fees has been the determining factor in the increase in due process requests. The fact is that such fees are available and some attorneys may consider this availability in accepting or rejecting certain cases. However, there are no systematically collected statistics to support that contention.

This issue appears to be of concern only in those states that (a) allow attorneys to represent either or both parties at a mediation, and (b) have many mediations. Local school districts in Connecticut and Massachusetts may be paying great amounts of money to attorneys, but neither state collects any data from local districts regarding such fees. The data on incidence do not indicate a steep rise in numbers of mediations that could be traced directly to the advent of the attorneys' fees bill. While Massachusetts has seen some increase in the use of mediation, Connecticut has not had a significant increase since the early 1980's (from a total of 83 in 1981 to 88 in 1993). In Connecticut, there was an

increase in hearings (from 41 in 1986 to 77 in 1993), but there is also a greater percentage of hearings that concluded with negotiated settlements rather than with the rendering of a hearing decision.

DISCUSSION

The due process component of special education legislation (state and federal) is based on the premise that local school districts and parents may not always agree on what constitutes an acceptable program to accommodate the right of a student with disabilities to a free and appropriate public education. The legislation also suggests that the responsible professional educators may not be aware of what is educationally appropriate for a given student with disabilities. Given these suppositions, the parents of students with disabilities have been granted rights not available to the parents of students who do not have disabilities–the right to propose alternative programs/placements that they consider appropriate, and the right to due process procedures for consideration of enforcement of such alternatives.

No doubt, one result of the legislation has been to raise the consciousness of the education community, both parents and professionals, regarding the needs of students with disabilities. Without such legislation many, if not most, of these students may have continued to be denied access to a free appropriate public education. Lacking the due process component, the legislation would probably have been rendered ineffective in its goal of changing the status quo.

Special education due process hearings often demonstrate the lack of consensus regarding the appropriateness of any particular type of special education program for a given child. In such hearings, the school and the parent will each bring in fully credentialed experts in support of their respective programs and/or placements. Given this scenario, the hearing officer is usually forced to choose between two (or more) professional opinions. It is now rarely, if ever, the case of a child being denied a right to a public education; it is usually the case of selecting from an ever changing sea of educational theory the program or placement that seems better or more appropriate for that child. Although the right to a "better" educational program is not a part of the legislative mandate, it may be difficult to expect a hearing officer to deny to a student with disabilities a program strongly defended as the superior one. The Supreme Court upheld the "appropriate" standard in 1982 in the *Rowley* case.[6] However, even if the school district believes the hearing officer has overstepped the bounds of his or her authority, the cost of appealing may be prohibitive. In some circuits, if the appeal is lost, the district will almost automatically be required to

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[6] *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034 (1982).

pay all of the parents' attorney's fees. That may have been a major factor in the profile of court appeals in Connecticut for 1991, 1992 and 1993: 22 cases appealed, nineteen by parents and three by school districts.[7] The perceived arbitrariness of such decision making and the risk involved for both parties may be the driving force in the limited number of hearings which actually go forward, and the further reduction in numbers of litigations when only actual rendered decisions are counted.

The most significant statistic in Table 1 may be the very small number of due process sessions which actually take place when they are taken as a percentage of the number of students for whom such procedures are available. For example, in Massachusetts, only two percent of all IEPs generated throughout the year are rejected. New Jersey, with 178,324 identified students, reported holding only 176 hearings. This represents only .001 percent of the number of students for whom due process is available in that state. Since conflict in this area of education is inevitable, there are very few (percentage-wise) hearings in relation to the number of identified students. While it may be that some parents are not fully informed of their rights or do not choose to participate in due process procedures, these small percentages indicate that most problems are, in fact, worked out whether or not formal conflict resolution procedures such as mediation are utilized.

Without a clear definition of what is right or wrong as an educational program for a given child, the due process system is reduced to a conflict between what a parent wants and what a school is offering. Has the present system resulted in better educational programming for the student with a disability? Do students with disabilities in those states with the greatest number of due process cases (from mediation through appeals to court) exhibit a higher rate of achievement (success) than those in states with the fewest number of cases?

No scientific evidence has been gathered to answer such questions. There have been surveys that indicate that Connecticut and Massachusetts were correct in their early assumption that mediation would be less costly and less emotionally draining to schools and to parents than full blown hearings. But, whereas the adults involved may suffer less stress, there is no evidence that the programs instituted as a result of the time and effort invested in mediation are any more or less productive than those determined by a hearing officer, or a judge, or by a school district which remains unchallenged in presenting the same program to the child of a different set of parents.

CONCLUSION AND RECOMMENDATIONS

While there is a distinct absence of any research evidence of efficacy, the prevailing opinion resulting from surveys and anecdotal information favors the use of mediation as a

[7] Connecticut State Department of Education

valuable problem-solving technique in special education. In a series of proposals published in the *Montana Law Review*, Zirkel (1994) suggests ways in which overall due process procedures might be modified to improve the process. As part of his five point proposal, he suggests that hearings should be redirected to a problem solving rather than an adversarial model, limiting attorney's fees to the judicial stage and limiting hearings to one full day. The mediation models reviewed here are all, regardless of differing approaches and procedures, dedicated to the resolution of a disagreement through a negotiated agreement with the help of a neutral, knowledgeable third party.

However, there are issues related to the provision of mediation as an option to due process hearings that need to be addressed. They include the growing cost to states in maintaining this service, and the excessive litigiousness that at times characterizes the process. One strategy to deal with the latter problem is delineation by each state of the participants allowed at mediation and excluding attorneys as has been done in California by law[8], or in other states on a voluntary agreement basis. However, those states that felt it necessary to allow both parties to be represented by attorneys would, given current legislation and case law, be required to grant attorneys' fees to parents who prevail in all or part of the process.

Resolving the problems of increasing costs for states to maintain a mediation system is more complex. Some relief might result from the better preparation of all special education personnel in the skills of dispute resolution. An increased capacity in resolving differences could be used to prevent the escalation of disagreements between parents and school officials as they jointly design programs to meet the needs of students with disabilities.

While this synthesis was focused on mediation which is only one aspect of the entire due process system, suggestions are being made in the field that it is time to review <u>all</u> aspects of special education due process in light of twenty years of implementation. The pending reauthorization of the IDEA provides an opportunity to do such a review. Concerns and suggestions such as those made in the book, *Special Education: Good Intentions Gone Awry* by Edward Moskovitch, merit attention and consideration. The entire topic of due process in special education has not been the subject of any rigorous research. Further study of the many complex issues involved in mediation as well as the other aspects of due process rights for students with disabilities and their families is sorely needed. It is only by studying what has actually occurred as a result of the legislative mandate that we will be able to draw conclusions regarding changes that could contribute to improved results for students with disabilities while, at the same time, maintaining legal protections.

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[8]California law prohibits attorneys or other independent contractors who provide legal advocacy services from participating in a "pre-hearing request mediation," but those individuals may participate in any stage of the hearing process including mediation that occurs after a due process hearing has been requested.

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